

1895

# The Discriminating Clauses of the Inter-State Commerce Act

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THE  
DISCRIMINATING CLAUSES  
OF  
THE INTER-STATE COMMERCE ACT

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-THESIS-

PRESENTED FOR THE DEGREE OF BACHELOR OF LAW

-BY-

JOHN BENNETT TUCK, B.L.

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CORNELL UNIVERSITY -- SCHOOL OF LAW

1895

## P R E F A C E.

It has been my aim in preparing this work to supplement a paper presented in 1893 upon The Inter-State Commerce Commission, discussed from an economic standpoint. But in doing this I have been compelled, by lack of time, to confine myself to a very limited field, viz., the first five sections of the act which gave rise to the Commission, and which I have termed the "Discriminating Clauses".

It will be observed that I have dealt almost exclusively with Federal decisions. This has seemed wise to me because the decisions of the Commission are not final, and also because matters of importance are not settled until they ultimately have found their way to the Federal Courts.

J.B.T.

Ithaca, N. Y., April 10, 1895.

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## CHAPTER I.

### I N T R O D U C T I O N.

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During the past fifty years the development of railways all over the world has been so marked as to characterize the age as one of railway building, but nowhere has it been so phenomenal as in the United States. The railway system of the United States has been the marvel of the world. Its expansion has been so rapid and unexpected that it has been impossible during the progress of its wonderful development to determine, with exactness, or to regulate, with careful consideration, its proper relation to the citizen or to governmental authority. That abuses are bound to arise in any industry of this character, seems inevitable. The signs of discontent produced by these inevitable abuses have been manifesting themselves for no short length of time. For more than twenty years this feeling of discontent has been shaping itself into a definite movement. But the conditions and circumstances that environed the early development of the railway system of the United States were such that it is easy to understand why no comprehensive and uniform plan of regulation was then thought of or developed. The great and absorbing



problem was not how to regulate railways, but rather how to get them.

With this stimulus railways have been brought near our government in many ways. Their very existence is the result of permission granted by our government. Yet the Federal authority has gone even further. Not always have the prospects of large returns from the risk incurred and the capital invested been sufficient to induce capital into railway construction, so, in many cases, our government has lent a helping hand to these timid monopolies. Two hundred millions acres, at least, of our public lands have been given to the great western trunk lines as a sort of subsidy to stimulate railway building.

However, during these years of marvellous development the lines of public opinion have been drawn tighter and tighter on railways on account of the multitude and magnitude of abuses perpetrated by them. The people keep demanding governmental control as they are so apt to do in Democracies where abuses are practiced. That there was cause for complaint, there cannot be the slightest doubt, even though the means taken to correct it were severely criticised by many.

The whole movement for reform is contrary to the Laissez-faire school of economic thinkers and also the

Ricardian Doctrine, which are based upon the assumption that when earnings fall below cost of service, active competition would then cease. "This fails" says Professor Hadley, "because far below the point where it pays to do your own business, it pays to steal business from another man". Ricardo's theory worked well when applied to mercantile competition but fell hopelessly when applied to railroads. (Hadley's Railroad Transportation.)

The subject of railway legislation had been much discussed in Congress prior to March, 1885, when the Senate passed a resolution appointing a select committee of five senators whose duty it was to investigate and report upon the matter of the regulation of transportation. They were to report on or before the second Monday of the following December. The committee was composed of the following senators : Collin, of Illinois ; Miller, of New York ; Platt, of Connecticut ; Gorum, of Maryland ; and Harris, of Tennessee. From March, 1885, until January, 1886, when they submitted their report, they were engaged in collecting testimony all over the United States. The testimony taken, with statements in response to correspondents, were reported in a volume containing more than 1450 pages. The book represents the best thought of the American people on the subject of transportation at that time.

The committee summed up the charges which were in-

directly formulated in the statements and testimony as follows :-

1. Local rates are unreasonably high when compared with through rates.

2. Both local and through rates are unreasonably high at non-competing points, either from absence of competition or in consequence of pooling agreements which restrict its operation.

3. Rates are established apparently without regard to actual cost of service performed, and are based largely upon what the traffic will bear.

4. Unjustifiable discriminations are constantly made between individuals in the rates charged for like services under similar circumstances.

5. Improper discriminations are made between articles of freight and branches of business of a like character and between different qualities of the same class of freight.

6. Unreasonable discriminations are made between localities similarly situated.

7. The effect of the prevailing policy of railway management is, by an elaborate system of secret special rates, rebates, drawbacks, and concessions, to foster monopolies, to enrich favored shippers, and to prevent free competition in many lines of trade in which the item of transportation is an important factor.

8. Such favoritism and secrecy induce an element of uncertainty into legitimate business that greatly retards the development of our commerce and industries.

9. The secret cutting of rates and the sudden fluctuations that constantly take place are demoralizing to all business except those of a speculative character, and frequently occasion great injustice and heavy loss.

10. In the absence of national and uniform legislation they are able by various devices to evade their responsibility as carriers, especially on shipments over more than one road or from one state to another, and shippers find great difficulty in recovering damages for losses of property or for injury thereto.

11. The railroads refuse to be bound by their contracts and arbitrarily collect large sums in the shape of overcharges in addition to the rates agreed upon at the time of shipment.

12. Railroads often refuse to recognize or be responsible for the acts of dishonest agents acting under their authority.

13. The common law fails to afford a remedy for such grievances and, in case of disputes the shipper is compelled to submit to the decision of the railroad manager or pool commissioner, or to run the risk of incurring further losses by greater discriminations.

14. Differences in classification in use in various

parts of the country, and sometimes for shipments over the same road in different directions, are a fruitful source of misunderstanding, and are often made a means of extortion.

15. A privileged class is created by the granting of passes, and that the cost of passenger service is largely increased by the extent of this abuse.

16. The capitalization and bonded indebtedness of the roads largely exceed the actual cost of their construction or their present value, and that unreasonable rates are charged in the effort to pay dividends on watered stock and interest on bonds improperly issued.

17. Railroad corporations have improperly engaged in business entirely distinct from that of transportation, and that undue advantages have been offered to business enterprises in which railroad officials are interested.

18. The management of railroad business is extravagant and wasteful, and that a needless tax is imposed upon the shipping and traveling public by the unnecessary expenditure of large sums in the maintenance of a costly force of agents employed in reckless strife for competitive business. (A. B. Stickney, The Railroad Problem. The Forum, Vol. XI. The American Economic Association, Vol. II. Annual Reports of the Inter-State Commerce Commission, Vol. I.)

It will be observed that the most important, and in

fact nearly all of the foregoing complaints are based upon the practice of discrimination in one form or another. It is these complaints that have given rise to the discriminating clauses of the Inter-State Commerce Act, which it is the province of this paper to discuss.

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CHAPTER II.  
THE INTER-STATE COMMERCE ACT.

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On the basis of the report mentioned in Chapter I, the the Senate proposed a bill as a solution of the difficulty, but, as is not unusual, the House objected. The more numerous branch of the national legislature wished the bill to contain more inflexible rules. As a result, all legislation was at a standstill on account of the deadlock which this bill produced between the two houses. As the close of the session was drawing near, a conference committee was appointed to work a solution of the difficulties which for some time had rendered the houses of the national legislature hostile camps, making legislation of any kind impossible. The Senate bill was finally patched-up by adding, among other things, the important matter, the short-haul and the anti-pooling clauses both of which will be treated in detail in later Chapters. The bill was known as "An Act to Regulate Commerce", but more commonly known as "The Inter-State Commerce Act". It passed the Senate February 4, 1887, by a vote of 43 to 15 and passed the House by a vote of 191 to 32, going into effect in April of the same year, and is found in 24 U.S.Stat. at Large at pp. 379-87. In 1889 the origin-

al act was amended by modifying some of the original 24 sections, but as none of the amendments in any way affect the first five sections, which are the subject of this paper, it will be unnecessary to do more than mention that certain sections of the original act were modified in 1889. These amendments may be found in 25 U.S. Stat. at Large at pp. 855-63.

The first five sections, or as they will be termed in this paper, "The Discriminating Clauses of the Interstate Commerce Act", are as follows :

Enacting clause.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous passage or shipment from one State or Territory of the United States, or of the District of Columbia to any other State or Territory of the United States, or the District of Columbia, or from any other place in the United States to any adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property, shipped from



any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall not apply to the transportation of property or passengers or to the receiving, delivering, storage, or handling of property, wholly within one State, or not shipped to or from a foreign country from or to any State or Territory as aforesaid.

Definition of the terms "railroad" and "transportation".

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease ; and the term "transportation" shall include all instrumentalities of shipment or carriage.

Unjust and unreasonable charges prohibited.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just ; and every un-

just and unreasonable charge for such carriage is prohibited and declared to be unlawful.

Special rates, rebates, drawbacks, etc., prohibited.

Sec. 2. That if any common carrier subject to the provisions of this act shall directly or indirectly by any special rate, rebate, drawback, or other device, charge, demand, or collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of property subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful.

Undue or unreasonable preference, advantages, prejudices and disadvantages prohibited.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation, or locality, or

any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever.

Discrimination between connecting lines prohibited.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines ; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to any carrier engaged in like business.

Less charge for long haul than for including short haul prohibited ; except when authorized by the Interstate Commerce Commission.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for transportation of passengers or like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance ; but this shall not

be construed as authorizing any common carrier within the terms of this act to charge and receive as great a compensation for the shorter as for the longer distance ; Provided, however, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which any designated common carrier may be relieved from the operation of this section of this act.

Freight pools prohibited.

Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any compact, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof ; and in any case of an agreement for the pooling as aforesaid, each day of its continuance shall be deemed a separate offence.

For some time the constitutionality of the Law was held seriously in question by railroads officials and also by the advocates of the Laissez-faire school of econo-

mists. They held that this was a law of man designed to replace a natural law, and that Congress had no authority or right to interfere in railroad management. They, together with many of less economic minds, forgot that Article I, Sec. 8, Subdivision 3 of the Federal Constitution gives Congress power to "Regulate commerce with foreign nations, among the several States and with the Indian Territories". And Congress, the Commission which the act created, and the Supreme Court of the United States have decided that the word "commerce" in this connection means "intercourse of whatever character which crosses the boundary line of any State". (Gibbon v.Ogden,9 Wheat.1; Cooley's Principles of Constitutional Law,p.64.)

Rate being the principal object to which legislation was directed, two classes of questions are involved in its consideration. These two classes are wholly distinct in their nature and widely different in their appropriate treatment. One class relates to methods by which the justice and reasonableness of a rate is to be determined, the other to the measures by which the observance of that rate is to be secured. It is one thing to fix the standard of compensation for a carrier's service, it is quite a different thing to enforce the carrier's adherence to that standard in its dealings with the public. (I.C.C.Reports, 1893,p.6.)

The special remedies provided by the Inter-State Com-

merce Act are cumulative and not exclusive of the general remedies given by the Judiciary Act, conferring jurisdiction of all suits and controversies arising under an act of Congress, regardless of any diversity of citizenship between the parties. (Little Rock & M. Ry. Co. v. East Tenn. & G. Ry. Co., 47 Fed., 771.) In this connection it is worthy of note that the Inter-State Commerce Commission is not a court but an administrative body, exercising powers which are quasi judicial, but its decisions are entitled to the highest respect in the Federal Courts. (I. C. C. v. Cincinnati, N. O. & T. P. Ry. Co. 64 Fed. 981.)

Congress may give the Federal Courts exclusive jurisdiction in such cases where the right of action arises under and by force of their acts. In matters to which this act applies it has opened to an aggrieved party but two channels to justice, viz., the Inter-State Commerce Commission and the Circuit and District Courts of the United States. There is no third. The State Courts have absolutely no jurisdiction in the matter. (Copp. v. Louisville & N. Ry. Co., 9 So. (Ala.) 441.)

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## CHAPTER III.

"PARTY RATE" TICKETS.  

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A mere glance at the causes of complaint formulated by the Senate committee, and which are given at length in Chapter I, easily warrants the assertion that discriminations in one form or another gave rise to the Inter-State Commerce Act. Therefore it is natural, and to be expected, that the cases arising under the act have grown out of discriminations in its various forms. But it is only the first five sections that in any way deal with discriminations, therefore only those sections will be considered here. For the purpose of a clearer consideration they will be classified and discussed, in this and the succeeding chapters, in the following order, viz.: "Party rate" tickets, unjust discriminations, the long and short haul clause, connecting lines, the pooling clause, and the effect upon contracts.

A "party rate" ticket is a ticket differing from the ordinary ticket in that it is granted to a "party" of passengers rather than to one, by which, such party enjoys special advantages in the way of equal services for a less compensation, or better accommodations for an equal fare, or some other concession on the part of the transportation company over and above what is offered or given

to the ordinary passenger, in consideration of the greater number of passengers carried or an increase of business by virtue of a greater number of miles traveled.

The first case which arose involving this question was in 1890. It seemed that the Baltimore & Ohio Ry.Co. offered a 2¢ rate to parties of ten or more passengers, while single passengers were charged the regular rate of 3¢ per mile. After a careful consideration of the case the Court held that this was no violation of the act, on the ground that it was in the interest of the public and prevented the work of scalpers.(I.C.C. v. B.& O.Ry.Co.43 Fed.37.) In the following year a case of a similar nature arose. An agent of the Chicago,St.Paul & Kansas City Ry.Co. sold to one Petsch 5,000 "limited" tickets from St.Paul to Chicago at \$7.00 each. The tickets were to be punched on the margin in order to indicate the day on which they were limited. This, in fact, was not done. The price of unlimited tickets was \$11.50 as filed with the Inter-State Commerce Commission. The contention was that there was a violation of Section 6 of the Commerce Act. But it was held that there was not in fact a discrimination because unlimited tickets give the right to stop over and to check baggage to intermediate points, while in strictly limited tickets there must be a continuous passage and completed before the expiration of the time limited. And as in this case there was no time limited,



the tickets were good until used but no stop over could be given without violating the Commerce Act. (U.S. v. Egan, 47 Fed. 112.)

However, these two cases did not appear to settle the question, for in 1892 a case arose on a petition from the Inter-State Commerce Commission, which was prosecuted, with a vigor almost approaching violence, until it was decided by the Supreme Court of the United States. The opinion in the case is by Mr. Justice Brown and is both exhaustive and convincing. The decision of the Court and some of the arguments will be given in this and the succeeding pages. The learned Justice in substance said as follows: The issue, by a railway company engaged in inter-state commerce, of a "party rate" ticket for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on a similar trip does not thereby make "an unjust and unreasonable charge" against such individual within the meaning of Section 1 of the act; nor make an "unjust discrimination" against him within the meaning of Section 2 of that act; nor give "an undue or unreasonable preference or advantage" to the purchasers of the "party rate" tickets within the meaning of Section 3. The principal objects of the Inter-State Commerce Act were to secure just and reasonable

charges for transportation ; to prohibit unjust discriminations in relation to like services under similar circumstances and conditions ; to prevent undue and unreasonable preference to persons, corporations, or localities ; to inhibit greater compensation for the shorter than for the longer distance over the same line ; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, when such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburg ; but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by Section 2 to make an unjust discrimination. Indeed the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring

what shall be deemed unjust. It is true, a charge may be perfectly reasonable under Section 1, and yet may create an unjust discrimination or an unreasonable preference under Sections 2 and 3. As was said by Mr. Justice Blackburn in the Great Western Railway Company v. Sutton (L.R. 4 H.L. 226, 239) : "When it is sought to show that the charge is extortionable as being contrary to statutable obligations to charge equally, it is immaterial whether the charge is reasonable or not ; it is enough to show that the Company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

In order to constitute an unjust discrimination under Section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device ; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions," to bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a

large scale cheaper, proportionately, than upon a small scale, is impossible.

In delivering the opinion in this important case Mr. Justice Brown quoted from the opinion of Judge Jackson in the court below, as follows : "To come within the inhibition of the said section, the differences must be made under like conditions, that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity or partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination. (I.C.C. v. B. & O. Ry. Co., 145 U.S., 263.)

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CHAPTER IV.  
UNJUST DISCRIMINATIONS.

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The question as to what is unjust discrimination has drawn the courts into the greatest perplexities. The difficulties arise out of the wording of the act itself. It is clear that Congress did not intend to abolish all discriminations, only such as were unjust, else it would not have framed Section 3 so as to read: "It shall be unlawful x x x to give any undue or unreasonable preference or advantage x x x." It is plainly seen from Sections 2 & 3 that Congress contemplated two kinds of unjust discriminations; first, as to prices charged, and second, as to facilities and accommodations furnished. It is a criticism too harsh and entirely unwarranted to say that Sections 2 & 3 are loosely constructed, and that Congress intended to prohibit all discriminations.

Some of the difficulties into which the courts have fallen may be solved by a study of the differences between discriminations prohibited at common law and those prohibited by the statute. At common law discriminations which are unreasonable are such only as inure to the undue advantage of one person or class of persons in consequence of some injustice practiced upon another. The whole question is, "Does the carrier charge the complaining

party a fair and reasonable compensation ?" If such is fair and reasonable, it is immaterial what advantage is given the favored person or class of persons. So a carrier may charge one person or class of persons less than fair compensation, and others cannot justly complain so long as he carries on reasonable terms for them. (Mencho v. Ward, 27 Fed, 529.) The difficulty with the common law doctrine is that the test as to what is a reasonable charge to the complaining party may, and is apt to, depend largely upon what others are charged ; thus the common law rule would work a result similar to that produced by the statute. That the common law is changed by the act to regulate commerce is clearly shown in United States v. Tozer (37 Fed., 635), where it is laid down that the discrimination need not be confined to devices, or a special rate, rebate, drawback, but is committed by directly giving different rates to different persons. So a prima facie case is made out under the statute by simply alleging a difference in rate for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." What are "substantially similar circumstances and conditions" will be discussed later in this chapter.

The cases of course deal with particular states of facts and so the result of them can only be cumulative, as tending to bring together the various act which, in

the eye of the law, are just or unjust. So it was held to be unlawful for a railway company to carry cotton out of a general route and press it at its own expense for a charge equal to the published through rate, especially where the same advantages were offered to the petitioner, but who did not care to take advantage of them. (Cowan v. Bond, 39 Fed., 54) In United States v. Delaware, Lackawanna & Western Railway Company (40 Fed. 101) the respondents had contracts with two car companies for the use of certain cattle cars. Those of the Lackawanna Company could be used for coal on a return trip, while those of the American Company could not. An agreement was entered into whereby the respondents could carry horses only in other than the cars of the Lackawanna Company. One Morris offered cattle to be shipped in the cars of the American Company which were refused. In an action against the Company for thus refusing the horses in these cars it was held, that this was not an "unjust discrimination" in favor of the transportation company. The court said that "facilities" does not embrace car equipments for transportation of freight over the carrier's own road.

In Inter-State Commerce Commission v. Texas & P. Ry. Co. (52 Fed. 187) the question of "unjust discrimination" was also raised. The defendant showed plainly that unless they offered special rates to foreign goods they would lose certain traffic entirely. They relied upon

this as a ground for their failing to comply with the decision of the Commission. In concluding the argument the court said : "The Inter-State Commerce Act would be emasculated in its remedial efficiency, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless such rate is given, the traffic which would be obtained thereby would go to a competing road. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them, unless given an exceptional rate, to justify that one in making the discrimination in his favor, on the grounds of the necessity of the situation".

The most recent case that has arisen in which this point was involved is that of Little Rock & M.Ry.Co., v. St. Louis & S.W.Ry.Co. which was decided in September, 1894 and is reported in 36 Federal Reporter at page 775. The complaint stated that the defendant road required payment in advance of some patrons while this burden was not imposed upon others. The learned judge who delivered the opinion in the case said in substance the following : The common law right to require payment in advance of some customers, and of extending credit to others has not been taken away by the Inter-State Commerce Act, unless it is taken away incidentally by the inhibition contained in the third section of the act which declares that an interstate carrier shall not "subject any particular person,



company, corporation or locality x x x to any undue or unreasonable x x x disadvantage in any respect whatever". The judge said, I quote from the opinion, "This prohibition is very broad, it is true, but it is materially qualified and restricted by the words 'undue and unreasonable'. Such complained-of wrongs do not appear to have existed when the act was passed, and it does not seem that Congress contemplated any such situation. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right which all other individuals and corporations are still privileged to exercise and ordinarily do exercise".

Nor is it an unjust discrimination for a railroad company to make a special arrangement with a theatre troupe to carry them through by a certain hour, upon which the success of the performance depends. Neither is such an undue or unreasonable preference. (Foster v. Cleveland, C.C. & St. L. Ry. Co., 56 Fed., 434.)

The difficulties in which the courts have been involved in determining what are unjust discriminations within the meaning of the act are forcibly brought out in the masterly decision and arguments of the court in the case of Tozer v. United States (52 Fed. 917). In that case it was held that where two connecting lines agree on a joint through tariff, such joint tariff, or the

share of it which either takes, is not the standard by which to determine whether either line violates Section 3 of the act forbidding "undue preference". What is undue preference has caused the courts no slight amount of trouble ; it is indefinite and uncertain in the extreme. To punish criminally for its violation upon the verdict of a jury as to whether they think a preference reasonable or unreasonable would create quite as much uncertainty as does a certain section in the Chinese Penal Code, which reads as follows : "Whoever is guilty of improper conduct, or of such as is contrary to the spirit of the law, though not a breach of any specific part of it, shall be punished at least forty blows, and where the impropriety is of a serious nature, with eighty blows". There is very little difference between such a statute and one which would make it a criminal offence to charge more than a reasonable rate".

The distinction is recognized throughout the law between discriminations and preferences which are just and reasonable and those which are unjust and unreasonable, according as they are made or given under similar or dissimilar circumstances and conditions. Not all discriminations or preferences are forbidden or declared unlawful, but only such as are unjust, undue, or unreasonable. In each case, therefore, the question whether a discrimination is unjust, or a preference is undue or unreasonable,

either as to the common carrier, or the commerce it may transport, involves a consideration of the circumstances and conditions under which discrimination or preference is made or given (Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co., 37 Fed. 567.) The courts have had no slight difficulty in determining what are "contemporaneous services" and what are "substantially similar circumstances and conditions." The determination as to what are "circumstances and conditions substantially similar" is in each case a question of fact for the jury upon a proper direction from the court. (Osborne v. Chicago & N.W. Ry. Co., 48 Fed. 49.) Therefore little is to be found on this point in the reported decisions of the appellate courts. But as to the question what are "contemporaneous services" the problem in each case resolves itself into a question of law for the court. As yet few cases have arisen which have been decided on this point. Where the question has been involved the cases have been those in which the complaint is based upon a discrimination in services performed at times different only by a few days. For instance, in the case of United States v. Tozer (39 Fed. 369), it was held that to carry two barrels of sugar for one person on a given date and to carry one barrel of sugar for another person between the same points, over the same route, two days later, are "contemporaneous and like services" within the meaning of Section 2 of the Inter-State Commerce Act. But of course

if both services are for one and the same party, then no action can be maintained under the statute. (United States v Tozer, 39 Fed, 904.)

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## CHAPTER V.

LONG AND SHORT-HAUL CLAUSE.  

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The fourth section of the act contains the great discriminating clause known as the "long and short-haul clause" which provides that, "it shall be unlawful for any common carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of persons or like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance". From the passage of the act to regulate commerce this provision has been subjected to violent and persistent attacks. The practice of making low rates upon traffic upon which competition exists, and of charging high rates to non-competing points, and also upon strictly local traffic, was an abuse which had become so common that the framers of the law were convinced of the need of special protection to intermediate points. The enactment of the fourth section was therefore deemed a public necessity.

This rule, requiring carriers to establish aggregate charges with reference to the distance commerce is carried, seems so just and desirable that the opposition created

by its enactment and application appears astonishing to those who are unfamiliar with the rate-making methods which prevailed prior to 1887 ; and when upon inspection of the section it is seen that the rule is only applicable where the transportation for longer and shorter distances is conducted under circumstances and conditions which are substantially similar, this determined antagonism seems difficult to explain to persons well versed in the needs and requirements of railroad operation.

The long and short-haul principle is nothing more than an extension to places of the rate, and forbidding unjust discrimination between persons. It is as necessary to the prevention of illegal preferences between localities as the second section is to the prevention of wrongful favoritism as between persons. The fourth section, or the long and short-haul provision, and the second, or the unjust discrimination clause, stand in the statute as definite and specific rules on either side of the general and indefinite provision against undue preferences contained in the third section. They are, on account of directly applying to particular transportation services, essential to successful regulation, for their presence in the statute prevents a large number of abuses which would exist with impunity until separately condemned in actions brought under the third section or the first section of the statute. This is nothing more than an extension of the

old, but always applicable maxim, that "an ounce of prevention is worth a pound of cure". The most active denunciation of the fourth section comes from those whose arguments amount to an assertion that carriers should have the greatest latitude in establishing rates, and that sufficient public protection is afforded in the correction of wrongs which may be shown to exist by proceeding under the law. They would have no legal barriers but they caused the propriety of a legal cure.

But in spite of the satisfactory operation of the clause in general, strong opposition to the principle continued to be manifest in different quarters, and this eventually took the form of open defiance by asserting that the competition of two or more railroads subject to law is sufficient to warrant a lesser charge for the longer haul. This was contrary to the construction of the section as laid down by the Commission and approved by the courts. The Commission had held that the only railroad competition which may justify carriers in fixing rates contrary to the long and short-haul principle was in "rare and peculiar cases", and instances of hardship to circuitous lines entitled to engage in the traffic were given. But this restricted permission was distorted by a great many carriers into a general license to make any railroad competition an excuse for lower rates on longer hauls, with the result of greatly impairing the efficient

operation of the section and of entailing great hardship upon competing carriers whose rates were still based upon what the Commission had laid down as the proper meaning of this provision. The necessity of putting a stop to this abuse was plain, and the Commission in the Georgia Cases declared that competition between carriers subject to the law does not entitle either competitor to depart from the rule of the fourth section, and that permission to do so must first be sought from the Commission by an application for relief under the provisory clause of the section. It should be clear to all interests that upon such an application every carrier connected would be protected in its rights, and that any undue burdens shown would be removed by a relieving order. (I.C.C. Reports, 1893 pp. 31-3.)

But to render lawful a greater charge for a shorter than for a longer haul under Section 4 of the Inter-State Commerce Act, it is not necessary to first obtain authority from the Commission. Such charge is lawful if the circumstances and conditions are not in fact "substantially similar", and the carrier may determine the question for himself, subject to a liability for violating the act, if upon investigation, the fact be found against him. (I.C.C. v. A.T. & S.F. Ry. Co. 50 Fed., 295.)

It is obvious that the authority and power conferred upon the Commission by the proviso contained in Section 4 is limited to cases that fall within the enacting clause



of that section, for its purpose manifestly is to enable the Commission to relieve carriers from its operation in cases where it deems such action proper. Such purpose is also expressly declared in the concluding clause of the proviso. And the power thus conferred is exclusive and its exercise conclusive, and in all cases that fall within the prohibition of the enacting clause of the section to which the proviso is appended, that is to say, to every case where the carrier charges or receives greater compensation in the aggregate for the transportation of passengers, or like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance. In all such cases a greater charge for a shorter than for a longer haul is absolutely prohibited, unless the commission, for good cause, see fit to relieve a particular carrier from its operation. But if the circumstances and conditions are not substantially similar the prohibition imposed by the statute does not apply at all. This question the court must determine. If it finds that the circumstances and conditions under which the greater charge was made for the shorter than for the longer haul in question were substantially similar, the inquiry ends, and the order of the Commission must be enforced ; for in such case it was the exclusive province of the Commission to determine whether or not there existed such other circumstances as would make it proper to

authorize the defendant companies to charge and receive greater compensation for the shorter than for the longer haul. But if the case shows that the greater charge for the shorter than for the longer haul was made under substantially dissimilar circumstances and conditions, (there being no claim that the compensation charged or received for the shorter haul was otherwise unjust or unreasonable) then and in that event, it is manifest that the case does not fall within the prohibition of the Inter-State Commerce Act at all. (I.C.C. v. Atchison, T. & S.F. Ry. Co., 50 Fed. 295.) So it is held that it matters not so far as the fourth section is concerned whether the rate complained of is one which the defendant has made alone or that it is one which he has made working in conjunction with other roads. (Junod et al v. Chicago & N.W. Ry. Co., 47 Fed. 290.)

In Inter-State Commerce Commission v. Detroit, G.H. & M. Ry. Co. (57 Fed. 1005) a bill in equity was filed in the Circuit Court by the Inter-State Commerce Commission to restrain the defendant railway company from violating section four of the act. From the evidence it appeared that the defendant road delivered freight free by their own carts to customers in Grand Rapids consigned from the far East, while such was not accorded consignees living and doing business in Ionia, Michigan. With a very strong dissenting opinion by Severens, J., it was held that such granting of free cartage was an unjust discrimination

against the consignees in Ionia and prohibited by Section 4

An interesting case was decided in October, 1892 by the Circuit Court of Appeals involving the question of long and short haul and joint tariff rates. The facts are substantially these : The defendant in error, plaintiff below, owns and operates a railway from Missouri Valley, a town on the western border of Iowa, to Chicago, Illinois. Scranton is a town in Iowa on the line of this road eighty-eight miles east of Missouri Valley and therefore so much nearer Chicago. The Fremont, Elkhorn & Missouri Valley Railway Company owns a railroad running east and west through Nebraska, and connecting with the defendant's road at Missouri Valley. Blair, Nebraska, is a point on that road thirteen miles west of Missouri Valley. While the Fremont, Elkhorn & Missouri Valley Railway Company is an independent corporation, a majority of its stock belongs to the defendant company, and thus the defendant company controls its operation.

During the month of January, 1888, there was in force a local tariff of rates charged on defendant's road. This local tariff was duly published at Scranton. In accordance with it, the rate from Scranton to Chicago on corn was 18¢ per hundred weight. All shippers shipping simply to Chicago paid that rate. The plaintiff, among others, made sundry shipments and was charged and paid such sum. There was, so far as appears, absolute uniformity of rate

as to all such local shipments. At the same time the tariff on corn shipped through from Blair, Nebraska, to New York City was  $38-1/2\%$ ; to Boston, Philadelphia and Baltimore it seems that it was slightly above and below this figure. This through rate was made up in this way : By agreement between the defendant and Eastern companies, corn was shipped through to New York from Turner and Rochelle, two small stations on the defendant's road, one thirty and the other seventy miles west of Chicago, for  $27-1/2\%$ ,  $3-1/2\%$  of which went to the defendant and the balance to the Eastern companies ; and by agreement between the defendant and the Fremont, Elkhorn & Missouri Valley Railway Company the rate from Blair to Turner and Rochelle, on corn shipped to New York Boston, Philadelphia or Baltimore was  $11\%$ . In other words, by these agreements of the several companies a through rate was fixed on corn shipped from Blair to New York and other Eastern cities ; and of that through rate the defendant company, for carrying the whole line of its road, less the local tariff of  $18\%$  charged from Scranton to Chicago. This joint tariff was not published at Scranton and no notice of it was given to or possessed by the plaintiff until February 24, and until that time he made no application for shipment beyond Chicago. Therefore he shipped to Boston and received the benefit of the through rate.

In writing the opinion in this case, Mr. Justice Brewer

made the following remarks :

First : "That Congress has not attempted to require that tariffs on all roads be uniform ; nor has it attempted to place a limit in figures beyond which no company may go in its charges. The laws of business and competition have, as yet, been deemed sufficient restraints in that direction. The Rock Island is, between Chicago and the Missouri River, a parallel and competing road with the defendant company ; yet there is nothing in the Commerce Act which compels either company to charge for through or local transportation the same as its competitor. Either company may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the service without violating the act ; and such reduction compels no change by its competitor or any other company. This is obvious from the reading of the act."

Second : "That where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any part of their lines, such joint tariff is not the basis by which the reasonableness of the local

tariff of either line is determined. To illustrate : On the defendant's road the distance from Turner to Chicago is thirty miles ; on the Lake Shore line, from Chicago to Cleveland, it is two or three hundred miles. The defendant company may charge 15 ¢ for transporting grain the thirty miles from Turner to Chicago, provided it be in fact only a reasonable charge for the service, although the Lake Shore Company charges no more for transporting grain from Chicago to Cleveland ; the fact that the rate on each line is 15 ¢ for the distance named will not prevent the two Companies from making a joint tariff for grain shipped from Turner to Cleveland of 12 ¢, less than the local tariff of either. That we may not be misunderstood, we do not mean to intimate that the two companies with a joint line, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo ; for when the two companies by their joint tariff make a new and independent line, that new and independent line may become subject to the long and short-haul clause. But what we mean to decide is that although tariff on a joint line is not the standard by which the separate line of either company is to be measured or condemned." (Chicago & N.W.Ry.Co. v. Osborne, 52 Fed. 912 ; followed in United States v. Mellen et al, 53 Fed. 229.)

This last proposition may not appear as obvious as the former, and yet a careful study of the act leaves no doubt

as to its correctness. In the first section a definition of the term "railroad" is given, which in addition to bridges and ferries includes, "also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease." A joint tariff does not bind road to road in the same sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge, and a continuity of transportation over connecting roads. Neither is there any mandate to connecting companies to surrender any control over their own roads, nor to unite in a joint tariff.

"Reasonable, proper, and equal facilities for the interchange of traffic" are commanded by the third section, but with the proviso : "This shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to any other carrier engaged in like business". No power existed at common law, and none is given by the act to court or commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in joint tariffs. (Express Cases, 117 U.S., 1 ; Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co., 37 Fed., 567 ; Little Rock & M. Ry. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed., 559.) Further, it is a fact that at the time of the passage of this act joint through tariffs were well known ; as well

as the fact that they were generally less than the sum of the local tariffs, and not distributed between the several companies making them according to the mere matter of mileage. In this act joint tariffs are recognized ; and if Congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific.

It is worthy of note also that in the debates which attended the passage of the bill through both houses, and while the matter was under discussion, it was again and again said by those participating in the debates that the line formed under the joint tariff of connecting companies was one separate and independent from that of either of the connecting companies ; and also worthy of note that in the actual administration of affairs by the Inter-State Commerce Commission the same thing has been repeatedly recognized. (Chicago & N.W.Ry.Co. v. Osborne, 52 Fed, 912.)

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## CHAPTER VI.

### CONNECTING LINES.

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It may be seen by a glance at the cases referred to in the preceding chapters that the matter of connecting lines has occasioned not a little litigation and has in some cases involved the courts into the greatest difficulties. The questions of greatest interest in this connection have arisen upon the construction of "equal facilities" and "connecting lines" as found in the latter half of Section 3 of the Inter-State Commerce Act.

The Commission in its annual report to Congress for the year 1892 dwells at some length upon the important case of the Oregon Short Line v. The Northern Pacific Railway Company (51 Fed.465) which was decided by the Circuit Court of Appeals on June 15, 1892. The gist of the decision is that the third section -- the undue preference and facilities clause-- of the Inter-State Commerce Act, does not require a railroad company to receive freight in the cars in which it is tendered by a connecting line and transported in such cars, paying car mileage therefor, when it has cars of its own available, and the freight would not be injured by the transfer. That there was abundant opportunity for argument upon this question is clearly seen from the strong dissenting opinion by Dealy J.

from which the following is a quotation : "To exchange freight in bulk by railroads is certainly 'a reasonable and proper facility'. It is a general custom, except in some special instances like this, where the carrier disobeys the injunction of law for the purpose of injuring a competing line in its own interest. To exchange freight by the car load is a 'reasonable and proper facility for the interchange of traffic between these lines', and it is such a facility to enable them to receive and forward passengers and property to and from their respective lines and those connecting with them. On the other hand to require the plaintiff to unload its cars with freight destined for points on the (Puget) Sound, at Portland, and there reload the same on the defendant's cars as freight originating at the latter point, is to afford no facilities for such purpose at all. Such a construction of the statute renders it altogether nugatory and leaves the matter as at common law. The section goes beyond the common law, and therefore it must impose a duty beyond that of merely receiving freight from the plaintiff when unloaded from its cars."

The difficulty appears to centre around the word "line". In the same case from which the above is a quotation a further doctrine is laid down, which although only dictum, is very strong, viz., that the joint line formed by the two roads is wholly independent of the two

lines represented by the respective roads, that the total joint rate is not the standard by which the reasonableness of rates over the individual lines can properly be measured, and, therefore, that the total joint rate over the two roads not being over "the same line", might for anything in Section 4 of the act, not only be as low, but even lower, than the local rate of either. Further, the meaning of the word "line" in the fourth section, as construed by the Commission in its decision in the Central Vermont Cases (1 I.C.C. Rep.,158), and generally accepted by carriers throughout the country, is that "a physical line is meant, not a business arrangement, and one piece of a road may be part of many lines". That this is the construction intended by the framers of the act may be seen from the following quotation from the speech of Senator Aldrich made in the Senate while the bill was under consideration; "The word 'line' as used in the fourth section, can have but one meaning, and that is the physical structure, the track over which property is transported. To transform this mass of rails, ties, and sidings, over which freight is hauled into a living, responsible being, which can make contracts and be subject to penalties, is beyond the power of human effort". (Debates on Inter-State Commerce, 49th Congress, Second Session; I.C.C. Reps.1892,pp.30-3.)

In 1892 a case arose involving the same clause of Section 3, but in a slightly different way. The petition

presented by the line affected averred that the petitioner was deprived by the respondent of equal facilities with a competing connecting line for the interchange of traffic, a discrimination in rates, the withdrawal of a joint through tariff, and a threat to close a through route via petitioner's line. In that case it was held that a charge, not only of discrimination in rates, but also of failure to provide equal facilities for the interchange of traffic was properly brought to the cognizance of the Commission, and that upon the showing of proper proof an injunction would issue to prevent such abuse. (N.Y. & N.Ry. Co. v. N.Y. & N.E. Ry. Co., 50 Fed., 867.)

But where two connecting carriers united in putting in force a joint through tariff between given points it has been decided that, under sections 3 & 4 of the act, such joint tariff is not the standard by which local tariffs on either road is to be determined and the fact that a railway company charged a local shipper more for transporting property between two points on its road than it charged for the same service when the property was received from a connecting road, and was carried under a joint tariff established by the connecting carriers, does not establish the charge of undue preference or discrimination.

(Parsons v. Chicago & N.W. Ry. Co. 63 Fed, 903 ; Little Rock & W. Ry. Co. v. East Tenn. V. & G. Ry. Co., 47 Fed., 771.)

The provisions of the Inter-State Commerce Law for-

bidding discriminations against any locality or description of traffic is for the protection of the locality or traffic itself, and cannot be invoked by a carrier as against a connecting line which discriminates in the matter of requiring prepayment of freight and car mileage, between goods which come from different sections of the country over the line of the connecting carrier. The provision requiring carriers to afford all reasonable, proper and equal facilities for the interchange of traffic, and forbidding discrimination between connecting lines is not violated by receiving and forwarding, without prepayment of freight or car mileage, cars of other companies containing goods coming from one locality, and refusing to do so unless prepayment is made, when goods are from a different locality. (Oregon Short Line & W.N.Ry.Co. v. Northern Pacific Ry.Co., 61 Fed., 158.) The case of Little Rock & M. Ry.Co. v. St. Louis & S.W.Ry.Co. (63 Fed. 775) is a similar case. It has been discussed in another connection.

It is a fundamental principle underlying the discussion of this matter as a whole that the Commission and the courts in general deal with these railroad problems only as they grow out of railway constructions actually in existence. In other words, they deal only with things as they find them and will not order new constructions. (Kentucky & I. Bridge Co. v. Louisville & N.Ry.Co., 37 Fed., 567.)

Neither can a carrier be forced to allow others to use its tracks. (Supra) Nor is a transportation company, operating a railway and a line of steamboats connecting at the company's wharf, required by Section 3 to permit the boats of competing lines to land at such wharf. (Ilwaco Ry. & Nav. Co. v. Oregon Short Line & W.N. Ry. Co., 57 Fed, 673.)

Still further it is held that a railroad company is not required by the Inter-State Commerce Act, Section 3 cl 2, to furnish to competing connecting carriers equal facilities for the interchange of traffic, which involves the use of its tracks by such carriers ; and it may still permit such use by one carrier to the entire exclusion of the others. Nor is a competing road which permits through billing and travelling with one forwarding road obliged to do likewise with another forwarding road, although the latter possesses all the necessary tracks and terminal facilities ; and it may still insist on carrying all freight offered by such road in its own cars, and to that end require reloading and rebilling at local rates. (Little Rock & M. Ry. Co. v. St. Louis, I.M. & S. Ry. Co. 59 Fed., 400.)

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CHAPTER VII.  
THE POOLING CLAUSE.

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Section 5, or the "Pooling Clause" of the Inter-State Commerce Act reads as follows : "That it shall be unlawful for any common carrier subject to the provisions of this act, to enter into any contract, agreement, or combination with any other common carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof, and in case of any agreement for the pooling of freights, as aforesaid, each day of its continuance shall be deemed a separate offence".

In investigating this topic the writer has been confronted at the very outset with the fact that this clause has met with almost universal condemnation. It has been attacked by some in a most violent way, while from others it has received harsh but judicial criticism. On account of this peculiar condition, the discussion in this chapter will be based almost entirely upon general principles and economic reasoning, and will deal in a very limited way, if in fact at all, with Federal decisions, which to such a great extent formed the bulk of the preceding chapters.

In the first place the "Pooling Clause" does not seem

to harmonize with those that precede it, and has it seems no proper relation to them. It could not have been formulated by those who were imbued with the spirit of the law, or fully comprehended its aim and object. As a matter of fact it was a result of the compromise between the two houses of Congress and was bitterly opposed by the Senate. It was accepted and incorporated into the act rather than endanger its passage. There is nothing in the act preceding Section 5 which indicates an intention on the part of the framers of the bill to deprive railroad companies of the right to make their own contracts in their own way, subject to the restrictions of law. The ample provisions made to prevent unreasonable and unjust charges would, if fully enforced, be sufficient to prevent any unjust rate, whether made by the companies by agreements among themselves or by the individual acts of individual companies. The law broad and catholic in its general character and based upon equitable principles, intends no wrong to the carrier and permits him to do no wrong to his patrons. It is the natural right of the individual to make such contracts as may suit his interests or his inclination, and while they are in conformity with law no one may restrain him. The same right belongs to the artificial person or corporation to the full extent of the powers acquired by charter, and, except for the statute, his right to make these contracts, within such limits,



would be undoubted. If this proposition be correct, the question presents itself with great force, why should these corporations be restrained from making such agreements as to rates and the division of business at competitive points as to them may seem desirable, provided always the rates are reasonable, just, and not discriminating. The law requires these conditions in the previous sections and has later on formed a tribunal to determine what is reasonable, what is just, and what is discriminative.

The question then resolves itself into this ; why was this section put into the law ? The only reason for it which appears upon the surface is that those who control the business interests of the competitive points seek to formulate such conditions that there will at all times be such struggles for business between the carriers that, by rebate or secret rate, they may expect to force some advantage to themselves. They have succeeded in working up the popular prejudices against corporations and have created the public sentiment that approved this section. It is believed that if its effect were well understood public sentiment would be quite as decidedly against the section : and "also that the section would be repealed, not modified, altered or amended for the reason that the freedom to make contracts with themselves and others should not be abridged unless clearly against public interest, and that interest so general in its character as to include

all points".(6 R.R. Commissioners' Reports,p.9-10.)

The above quotation is taken from Mr.Peter A. Dey's report to the Railroad Commissioners presented in May, 1894.

That he is too severe in his denunciation of the section and that his suggested remedies are too radical, there cannot be the slightest doubt. In fact, he admits in his opening remarks that he is going to exaggerate, and going to take extreme positions.

He says further, that it is believed, in considering the relation of railway companies to the public, that no special legal protection is necessary ; that it is fully prepared to look to its own interests, and if allowed to exercise the ordinary rights and powers that are necessary for the defence of property, it is fully able to care for itself. The difficulty with Section 5 is that it deprives the railroads of the only means they have at competitive points for relief from the effects of unregulated competition. Mr.Nimmo says that "agreements as to the apportionment of competitive traffic tend to promote the flow of commerce in its natural channels, x x x . The ordinary and and just administration of the railroad transportation interests of the country ought to be allowed to protect themselves against the effects of large shippers and vicious commercial trusts and other combinations to induce unjust discriminating rates, in their own favor." The law was not designed to obstruct or lay additional bur-

dens upon, but to regulate inter-state commerce, and if it is carried out in its spirit, would, it is believed, result in benefit as great to the corporations regulated as to the public.

It would seem that Section 5 was enacted in the belief that if the carriers were able to destroy each other, the public would permanently gain by their contests. This is believed to be a mistake, and that one of the most difficult tasks is to prevent these contests from injuring the communities depending upon them for transportation. It is observed that a large majority of railway managers who have expressed themselves on this matter are of opinion that pooling is dangerous and should not be allowed except by sanction of the Commission. The Commission is not supposed to be made up of experts in this branch of railroading, and there appears to be no objection to giving the companies the broadest latitude, and if in the carrying out of the pooling agreements the law is violated, or the individual or locality be discriminated against, there is ample power lodged in the board without this section to right the wrong. (6 R.R. Commissioners' Reports, pp. 10-13.) Mr. M.M. Kirkman, in his Railroad Rates and Governmental Control, bitterly opposes the "Pooling Clause". He claims that pooling is in accord with good business usage. It prevents foolish extravagance and materially lessens the cost of operation.

From the foregoing considerations a fair conclusion is as follows : The pooling clause seems to be out of place. It was opposed by the Senate when the bill first came up and was only accepted by that body as a sort of compromise between the two houses of Congress. It is a deplorable fact that many of our most important laws have been the result of patched up bills at the end of a stormy session as a sort of compromise. There appears to be nothing bad or wrong in judicious pooling. It should have been put in the act as being assisted, managed, and controlled by governmental authority. As eminent a jurist as the Honorable Thomas M. Cooley, first Chairman of the Commission, is of this opinion and his report in favor of it may be found in Vol.II of the Inter-State Commerce Reports.

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## CHAPTER VIII.

## EFFECT OF THE ACT UPON CONTRACTS.

Although the field which it has been the province of this paper to investigate has been one fruitful for inquiry and by no means exhausted, the writer feels that time will not permit of further research. Therefore this work will conclude with a brief mention of the effect of the act upon contractual relations, followed by some general comments by way of conclusion.

The question early arose, to what contracts does the act refer? From a careful consideration of the cases, the answer can only be that it refers to all contracts which contravene its provisions, whether made before or after its passage. In *Southern W.Co. v. St. Louis Bridge Co.* (38 Mo. App. ), it was held that the act to regulate commerce related back so as to make contracts, discriminating in their nature, invalid though made before its passage. A similar case is that of *Bullard v. Northern Pac. Ry. Co.* reported in 25 Pacific Reporter at page 120. It was there decided, after a very careful argument, that a contract entered into prior to the passage of the act, for the carriage of freight by a railroad company at a rate contrary to the provisions of that law, cannot be enforced after its passage, and the shippers cannot recover any re-

bates stipulated for in such contracts. The decision rested on the ground that the act to regulate commerce is a general law and contracts are always liable to be more or less affected by general laws, even when in no way referred to.

A contract which contravenes the provisions, or any of them, of the act to regulate commerce, is a contract in violation of the express provisions of law and is therefore utterly void as between the immediate parties to it. It is therefore impossible for a shipper to enforce against a railroad company a contract giving a preferential rate. (Hawley v. Coal Co., 48 Kan. 593 ; Chicago R.I. & P. Ry. Co. v. Hubbell, 38 Pac., 266.)

The Inter-State Commerce Act has been sharply criticised by some of our ablest economic thinkers. Mr. Aldrace F. Walker in his article in Vol. XI of the Forum, speaks of the act in this way. He says : "The essence of the Inter-State Commerce Law is that it forbids unjust discriminations under pains and penalties. In other words the result was forbidden while the cause was left in full operation. The symptoms of a disease had been submitted to a diagnosis and a treatment for the malady prescribed, while the cause was allowed to remain in full force." Mr. Walker claims that it was not perceived that competition might be regulated in its excesses without in any way affecting it altogether. He is a believer in the fundamental principles

of the act, and of the propriety of Federal intervention, but he does not believe that the best means have been taken to root out the evils of the railroad system.

There appears to be a general tendency to criticise the Commission, and much uncalled for censure has been heaped upon it. But it must be remembered that Commissions cannot see or reach all. The field of the Commissioners is a vast one. To those who may suppose that no good reason can be given why all disparities and inequalities of rates and methods may not be discovered and corrected as fast as they exist by a tribunal created and appointed by Congress for that purpose, it may not have occurred that the railroad mileage of the United States, if it could be transposed into that form, would make six parallel lines of railroad around the earth. Over this vast network of public highways, in extent without parallel, in diversity equal to its extent, and constantly increasing, the commerce of the United States is transported. The competition of carriers and localities contend for it with ceaseless energy. Its transportation is environed by different circumstances and conditions at many points in the vast confines of the Republic. That out of this condition of affairs, inequalities and disparities of rates must occasionally arise, even where the carriers who make them are actuated by the best of motives ; and that objectionable methods may in like manner

be adopted by them occasionally,-- is one of the inevitable features of such a system.

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